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IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977

No. 76-6985

WILLIAM PERRYMAN

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

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OPPOSITION OF JURISDICTION

Petitioner has failed to raise an issue of constitutional dimensions, requiring review pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On March 28, 1975, the Summit County Grand Jury (CR 75-3-436) indicted William Perryman (Petitioner), Wendell Pitts, and Delbert Richmond for the robbery-killing of Lawrence Busch, occuring on November 27, 1974. In addition to being charged with aggravated murder and aggravated robbery, the Indictment against the trio also contained two Specifications, alleging that the murder occurred during the robbery, and that the killing was committed to avoid detection.

On June 30, 1975, the Petitioner was convicted of all charges, with the exception of one specification, by jury. The testimony of Delbert Richmond was utilized by the State in the Petitioner's trial.

On July 24, 1975, Wendell Pitts was convicted of all charges, by jury.

On August 7, 1975, after a determination of no mitigation circumstances, the Petitioner was sentenced to death. On August 26, 1975, after a determination that a mitigating circumstance existed, Wendell Pitts was sentenced to life in prison.

Upon recommendation of the Prosecuting Attorney, Delbert Richmond was permitted to plead guilty to an amended Indictment of involuntary manslaughter and aggravated robbery. On September 26, 1975, Richmond was sentenced to 6-25 years in prison.

STATEMENT OF FACTS

On Wednesday evening, November 27, 1974, the day before Thanksgiving, Lawrence Busch was shot and killed during an attempt robbery of his business, the Star Supermarket, located in the City of Akron. The operative facts that culminated in this homicide were presented in the Petitioner's trial through the testimony of Delbert Richmond, an accomplice.

Richmond testified that the Petitioner was originally from New York and that he had known the Petitioner for approximately a year, having become acquainted while staying in the same Akron neighborhood. Approximately two weeks prior to Thanksgiving, 1974, the Petitioner and Richmond formulated a plan to rob the Star Market on Arlington Street.

The robbery plan required the use of a stolen car which was to be driven to the Star Market, and then parked at an angle in the parking lot to fake an accident. The Petitioner and Richmond would then enter the market separately. The Petitioner was to entice Busch outside the store while Richmond remained inside pretending to be shopping.

The plan then called for the Petitioner to force Busch, at gunpoint, into the stolen car. It was also planned that the Petitioner was to be the only robber with a gun. Busch was then to be transported to a designated laundromat where he would be forced to call the store and direct the employees that Richmond be given the supermarket money. After

receiving the money, Richmond was to leave the store and escape in the Petitioner's car, which was to be parked in the area.

The Petitioner and Richmond needed a third person to drive the stolen car, and subsequently took Wendell Pitts into their plan. The Petitioner was in charge of the group.

On the day before the robbery, the Petitioner and Richmond purchased a .38 caliber revolver in Barberton. The Petitioner signed for this pistol.

On the day of the robbery, the trio proceeded to the NRM Company in Tallmadge to steal a car. The Petitioner worked at NRM, and the group decided that this would be a good place to obtain a vehicle. Pitts picked out a '65 Buick and "popped" the ignition.

Pitts drove the stolen car to the Star Market with the Petitioner and Richmond following in the Petitioner's Oldsmobile. The Oldsmobile was parked around the corner from the Star Market, with the keys in it, and the trio then proceeded to the store in the stolen Buick. The Petitioner went in the market first, with Richmond entering a short time later. When the Petitioner and Richmond couldn't find the store owner, they went separately outside the market, at which time the Petitioner decided that they would re-enter the store and try again to locate Busch. The Petitioner then entered the store for the second time and directed Richmond to follow. Richmond testified that the store was so crowded

that he became scared, and instead of re-entering the supermarket he went next door to Church's Chicken. Pitts remained in the stolen Buick during this procedure. As planned, the Petitioner was the only robber with a gun.

After being at Church's Chicken for approximately two to three minutes, Richmond observed Busch jerk away from the Petitioner and then saw three gun flashes. Richmond further observed Busch stagger to the front door and saw the Petitioner jump into the stolen Buick which had already begun to move.

Richmond subsequently returned to the Petitioner's house where he observed the Petitioner's Oldsmobile. Pitts and the Petitioner were inside the house. The Petitioner told Pitts and Richmond that "I had to do it".

Richmond further testified that approximately a month after the killing he took possession of the murder weapon and traded it for a pound of marijuana. The gun was never recovered.

To directly corroborate Richmond's story, the State presented the testimony of Arthur Bechter, Karen Purkerson, Michael Alldredge, and Donald Woods.

Bechter testified that he was in the sporting goods business in Barberton, Ohio. Bechter further testified that his record (Federal Transaction Form) indicated that William Perryman (Petitioner), purchased a RG .38 caliber revolver and a box of .38 caliber amunition, on November 26, 1974.

Karen Purkerson testified that she was the assistant manager of the Church's Chicken, next to the Star Market, at the time Lawrence Busch was killed. Purkerson further testified that on November 27, 1974, at approximately 5:30 p.m., she heard three or four shots come from the Star Market and observed a man jump into a car that left the area. Purkerson's description of the car and suspect, along with the route of the car, corroborated Richmond's narrative.

Michael Alldredge testified that shortly after 5:15 p.m., on November 27, 1974, he was at the Star Supermarket. While he was leaving the store he observed an argument between Lawrence Busch and a man in the parking lot. The man was trying to get Busch into a 1965 Brown Buick. Busch didn't get in the car and turned to walk away. Alldredge then also turned and started for his car. Alldredge then heard three shots, and was almost hit by the Buick as it left the parking lot. Alldredge then followed in the direction of the fleeing car and discovered it abandoned in the area. At trial, Alldredge stated that he was about 85% certain that the Petitioner was the man he observed arguing with Lawrence Busch in the parking lot.

After being shot, Busch made it back inside the market where he collapsed between two cash registers and died. The Summit County Coroner testified that Busch was shot three times. Busch had two entrance wounds in the back, and

from metal scrappings taken from the brick wall of the Star Market, was determined to be a ricochet.

Donald Woods testified that Richmond had traded him a gun (RG .38) for some marijuana. Woods in turn sold the gun to an unidentified man that Woods never saw again.

The State offered further testimony that indicated that Perryman had not worked at the NRM Company the three days before the Busch killing, and that the '65 Buick was stolen from the NRM parking lot.

Detective Ed Duvall, Jr., testified that the Petitioner waived his Miranda rights after his arrest. While being confronted with the evidence against him, the Petitioner admitted that he did purchase a gun in Barberton, but that he gave it to Richmond "awhile back". The Petitioner then requested an attorney and the questioning ceased.

As indicated, one bullet was recovered from Busch's body, and another .38 caliber bullet was found in the Star Supermarket parking lot shortly after the Busch killing. A State's ballistic's expert testified concerning the class characteristics and the number of lands and groves on these two bullets. Based on this ballistic's examination, expert testimony was offered to establish that the referred to bullets could have been fired from the type of weapon purchased by Perryman the day before the Busch homicide.

In conclusion, the Petitioner's Statement of the Case adequately relates the defense theories offered at trial.

It should also be noted that the Petitioner maintained throughout the trial that he did not participate in the killing of Lawrence Busch, and opposed the trial court's charge on an aider and abettor theory.

PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PART B

THE OHIO STATUTES VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS BY PLACING THE BURDEN OF PROOF UPON HIM WITH RESPECT TO THE ISSUE OF DEGREE OF CULPABILITY AND RESULTING PUNISHMENT.

Mullaney v. Wilburn, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in Mullaney does not apply to sentencing. One can readily distinguish proof of an element of a crime from evidence presented at sentencing. The former is a presentation of the facts necessary to support each element of the crime. The Respondent accepts the burden of proving each element of the crime of aggravated murder beyond a reasonable doubt. It did so in this case.

However, sentencing and the procedures therein are a different matter. In State v. Downs, 51 Ohio St.2d 47 (1977), the Ohio Supreme Court overruled paragraphs 11 and 12 of the syllabus of State v. Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), and the language which appears in State v. Woods, 48 Ohio St.2d 127 at 135, 357 N.E.2d 1059 at 1065 (1976), which reads: "(t)his is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation". In neither case did the trial court require the defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death. Thus, the cited sections were held to be dicta.

The Downs opinion stated that it is the court that has the initial responsibility to require certain evidence to be collected and certain examinations to be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the defendant chooses not to present any evidence, the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. This requires that the defendant bear the risk of nonpersuasion during the mitigation hearing,

but does not impose an unconstitutional burden upon a defendant which would render the Ohio statutory framework for the imposition of capital punishment unconstitutional. Nor, does it make the lack of mitigating factors an additional and constitutionally mandated element of a capital offense, and the state is not constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt.

It is significant that at the Petitioner's mitigation hearing he presented no evidence as to mitigating circumstances. During the hearing the defense counsel stated the following:

> The thrust of the defense argument was that at no time has our client, who has always held himself with a great deal of dignity ever stated or ever feigned to this Court that he was suffering from a psychosis, from mental illness -- at no time.
>
> Secondly, at no time has our client stated that the victim induced or facilitated this. Our client instead has entered a plea of not guilty and has insisted upon his innocence. Transcript, Page 21.

The third mitigating circumstance, that the defendant acted under duress, had no bearing under the facts of this case and was not presented at the hearing. Petitioner's argument that strong provocation existed had no place in the mitigation hearing and in fact this issue had been decided by the jury with the return of a guilty verdict for Aggravated Murder with a specification. Nor is the fact that the

Petitioner's accomplice got a different sentence a mitigating circumstance.

Further, this Court sustained Florida's capital sentencing structure which is similar to the Ohio statute. Proffitt v. Florida, 428 U.S. 242 (1976). In determining that the death sentence should be imposed, the trial judge need only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., section 921.141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "Virtually no reasonable person could differ". Tedder v. State, 322 So.2d 908, 910 (1975).

Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute. Petitioner fails to show how the factors he complains of with respect to mitigation even apply and in fact admits the lack of mitigating circumstances under the statute.

PART C

THE OHIO DEATH PENALTY STATUTES VIOLATE PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OF HIS PEERS.

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Proffitt v. Florida, supra.

It is a somewhat analomous argument to say that juries will sentence more even handedly than judges in capital cases. Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have a one shot opportunity to exercise this function. To say that they will be less arbitrary, and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals, defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Petitioner facilely remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That

argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in the instant case the jury found the Petitioner guilty of murder during the commission of Aggravated Robbery. Ohio Revised Code Section 2929.04(A)(7) (Specification).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Revised Code Section 2929.03(D). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender." Thus, the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, Proffitt v. Florida, supra, then Ohio's statute should likewise meet

both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

PART D

THE STATE HAS ESTABLISHED NO COMPELLING STATE INTEREST WHICH WOULD JUSTIFY DEPRIVING PETITIONER OF HIS FUNDAMENTAL RIGHT TO LIFE.

Petitioner incorrectly utilizes a due process of law analysis to establish that the State has no justification for imposing the death penalty. Justice Reardon clarifies the role played by the due process clause of the Fourteenth Amendment in a constitutional attack on the State's right to impose the death penalty in the dissenting opinion of Commonwealth v. O'Neal, 327 N.E.2d 662, 700 (Mass. 1975):

> "The Eighth Amendment is the appropriate avenue for consideration of this question but standing by itself is not applicable to the States. Rather it is because the due process clause has been held to incorporate the proscriptions against cruel and unusual punishments contained in the Eighth Amendment that we refer to the latter amendment as binding on the States. ...Putting to one side the question of arbitrary inflictions of punishments, all indications are that the only substantive limitation on punishments contained in the Federal Constitution is the Eighth Amendment proscription against cruel and unusual punishment."

It has been argued that the death penalty is unnecessarily cruel, however, this is to deny retribution, deterrence and incapacitation as justifiable social purposes in the punishment of murderers. Evidence that the death penalty has a greater deterrent effect than life imprisonment has been inconclusive, however, this Court held in

Gregg v. Georgia, 428 U.S. 153, 175 (1975), that:

> "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."

It is at least true that the death penalty is not grossly disproportionage to the crime of murder committed in the course of a robbery. Nor is there any purpose to inflict unnecessary pain. As was noted by four judges in Trop v. Dulles, 356 U.S. 86, 99 (1957):

> "The death penalty has been employed throughout history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Petitioner's compelling state interest argument improperly raises a question under the Equal Protection Clause of the Fourteenth Amendment in depriving the Petitioner of "life, liberty or property". The Equal Protection Clause "applies only where there is an arbitrary discrimination between classes similarly situated". Roush v. White, 389 F. Supp. 396, 402 (N.D. Ohio 1975). The Petitioner has failed to establish a suspect classification.

The State submits that Ohio Revised Code Section 2929.04 (1974) does not create an arbitrary classification. It applies to all who are found guilty by a jury of aggravated murder, the principal charge, and of one or more of the specifications of aggravating circumstances, absent one of

the three explicitly stated mitigating circumstances.

Respondent submits that the proper test to be applied is the "rational basis" test set out in McDonald v. Board of Elections, 394 U.S. 802, 809 (1969) which states that the statutory classification is valid if it is rationally related to a legitimate state interest. The classification is afforded a presumption of constitutionality and will not be set aside if any set of facts reasonably can be conceived to justify it. The State submits that the death penalty is rationally related to legitimate state interests: deterrence of the crime of murder, retribution and incapacitation.

PART E

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATUTE ARE UNCONSTITUTIONALLY LIMITED.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of the facts. Ohio Revised Code, sections 2903.01, 2929.03, and 2929.04(A).

The death penalty is only considered at the sentencing state if a person is convicted of both the principal charge and the specification. If a person is convicted in such a manner, a separate hearing is conducted to consider mitigating factors, as set out in Ohio Revised Code, Section 2929.04(B).

> (B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Supreme Court of Ohio automatically reviews all cases in which the death penalty has been imposed. Ohio Constitution, Article IV, Section 2.

Petitioner contends that Ohio's capital punishment statute has the same deficiencies as were found to exist in North Carolina and Louisiana. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), Cf. Roberts v. Louisiana, 45 L.W. 4584 June 7, 1977. Those state capital punishment statutes were struck down because they had mandatory death sentences for certain classes of offenders, regardless, of the circumstances of the offender.

However, an analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., section 491.141. Proffitt v. Florida, supra. The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed aggravated murder with a particular specification, beyond a reasonable doubt. At the mitigation hearing any relevant evidence may be produced. The Ohio Supreme Court has held that:

> Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be

> considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence. State v. Bell (1976), 48 Ohio St.2d 270.

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors they are considered by the Ohio Courts. Jurek v. Texas, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. Jurek v. Texas, 262, 271-272.

Additionally the Ohio Supreme Court has stated:

> 1. For the purpose of the mitigation inquiry, the words "Psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to use the broadest possible latitude in determining the defendant's mental state or capacity.
>
> 2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary producing cause of his offense. State v. Black (1976), 48 Ohio St.2d 262.

Since Ohio has three specific mitigating factors enumerated and considers other mitigating factors in the

same manner as Texas, Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

The Ohio Supreme Court has reviewed approximately twenty death sentences, and reversed only one (State v. Lockett (1976), 49 Ohio St.2d 71 which originated from Summit County). However, of the total number of cases (28) from Summit County in which a defendant was charged with a capital offense, only thirteen reached the mitigation state, five of those defendants including the Petitioner now face the death penalty. Thus, it can be seen that a court can and does apply the mitigating factors where they are applicable.

Petitioner fails to show how the factors he complains of with respect to mitigation even apply to him. The State submits the nature of the crime, and all the other circumstances surrounding the Petitioner weigh heavily against, not for mitigation.

In summary, Ohio's capital punishment statute is not mandatory, and allows the broadest possible consideration of the defendant's mental state, age, and his circumstances including the nature of the crime in determining the applicability of the death sentence.

PART F

THE OHIO COURTS HAVE FAILED TO PROPERLY REVIEW OHIO'S DEATH PENALTY CASES.

Petitioner contends that Ohio Courts fail to properly review death penalty cases. The Ohio Supreme Court has stated:

> "We have in this case, and will in all capital cases independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." State v. Bayless (1976), 48 Ohio St.2d 73, 86.

Petitioner then analyzes certain aspects of several other Ohio cases involving the death penalty. However, this case, when examined carefully, shows that great care was taken to present any evidence concerning mental deficiency, including the factors enumerated in State v. Black, supra. The Ohio Supreme Court reviewed the extensive record compiled at the mitigation hearing and found that the trial court was correct in finding no mitigating factor.

Petitioner showed that he was not extremely intelligent and did not perform well in school. If that alone were the criteria for avoiding the death penalty, a large percentage of the population of Ohio could murder another person, without fear of the death penalty.

PART G

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO TRIAL BY JURY.

Petitioner misapplies United States v. Jackson, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in United States v. Jackson, supra, is simply not present in this case. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. Whether there are three judges or one judge, they are presumed to follow the law.

PART H

THE OHIO STATUTORY SCHEME FOR CAPITAL PUNISHMENT CONTAINS A SUBSTANTIAL RISK THAT CAPITAL PUNISHMENT WILL BE INFLICTED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Petitioner argues that since Ohio does not impose the death penalty in murder cases involving premeditated murder it allows the arbitrary infliction of the death penalty. This is directly contrary to the dictates of Gregg v. Georgia, supra for two reasons. First, excluding certain types of murder by narrowing the classification, is within the spirit of limiting the imposition of capital punishment, and providing guidance to juries as in Gregg. Second, counsel for Petitioner has supplanted its judgment for that of the legislature in determining what categories of murder should be punishable by death. Whether premeditated murder is more heinous than felony murder is clearly a legislative decision.

Petitioner also argues that there is no particularized consideration of the individual because it mandates that aiders and abettors get the death penalty. Simply put such is not the case. While an aider and abettor may be subject to the death penalty, there is no requirement that such a person receive the death penalty. Additionally, Petitioner has totally ignored the mitigating factors found in the code in the first part of this section, and then concludes that since mitigating circumstances have been found

in other cases the death penalty is imposed arbitrarily.

The State maintains that, to the contrary, the fact that mitigating circumstances were found in an appropriate case denotes that the death penalty is not automatically applied to all persons convicted of aggravated murder with a specification.

PETITIONER'S SECOND REASON FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF THE TESTIMONY OF A POLICE DETECTIVE CONCERNING A CONFESSION OF AN ALLEGED CODEFENDANT MADE TO A FELLOW OFFICER, AND THAT FELLOW OFFICER'S EXPERIENCE WHEN CONFRONTING THE PETITIONER WITH THE CONFESSION WHICH IMPLICATED THE PETITIONER AS THE "TRIGGERMAN" IN A CRIME IN WHICH HE HAD CONTINUALLY DENIED ANY INVOLVEMENT, WAS VIOLATIVE OF THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT OF CONFRONTATION WHEN NEITHER THE FELLOW OFFICER NOR THE ALLEGED ACCOMPLICE TESTIFIED AT TRIAL: AND WHETHER THIS WAS REVERSIBLE ERROR IN THAT IT CONTRIBUTED SUBSTANTIALLY TO THE PETITIONER'S CONVICTION AND THERE WAS NO OTHER OVERWHELMING EVIDENCE OF GUILT.

Assuming that the statement in issue is hearsay, Petitioner incorrectly asserts that hearsay on hearsay automatically creates error. As offered in Rule "805 of the Federal Rules of Evidence, hearsay on hearsay is permissible when valid exceptions exist.

The basic purpose of the rules on hearsay are to guarantee the trustworthiness of statements made at trial to insure the accused's constitutional rights to a fair trial. Respondent submits that the statement made by Ed Duvall, Jr. was properly admitted and met the requirement of reliability. As offered in Rule "803(24) of the Federal Rules of Evidence, a statement will be admitted if it is trustworthy and the interests of justice will best be served by admission of the statement into evidence even though the declarant is available as a witness.

In the instant case, Detective Duvall was relating

what took place at the questioning of the Petitioner. He was present throughout the time and in fact was simply giving a recitation of what Captain Traub said to the Petitioner. Traub was retired at the time of the trial and Duvall was called to testify. A statement of a police officer is assumed to be inherently reliable.

Further, both Richmond and Pitts were said to have implicated the Petitioner as "Triggerman". Richmond testified at trial and thus Petitioner had the opportunity to confront him, preserving his Sixth Amendment rights. Pitts did not testify at trial. However, Pitts had not been tried himself and was unavailable to testify under his Fifth Amendment right not to incriminate himself. Under Rule 804(B)(3) of the Federal Rules of Evidence, a statement against interest is admissible if the witness is unavailable on the ground of privilege from testifying.

Furthermore, the Petitioner's allegation that since the statement in issue referred to the Petitioner as the "triggerman", the statement on its face creates prejudicial error, is an erroneous assumption. The conviction in issue would be supported by the record even if the jury determined that the Petitioner was not the triggerman.

The Respondent contends that even if the Petitioner has demonstrated error, such error then must be considered harmless. Criminal Rule 52(A) states that "any error, defect, irregularity, or variance which does not affect substantial

rights shall be disregarded." What has transpired in the proceedings, if error, clearly falls within this rule. See, also, Criminal Rule 33(E)(3).

It is commonly accepted that "a defendant is entitled to a fair trial, but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619 (1953); See, also, Brown v. United States, 411 U.S. 223 (1973). As the Petitioner has indicated, there was only one instance found in the record where such evidence was admitted. That single piece of evidence is not sufficient in itself to require a reversal in the instant case, because in light of the other evidence submitted, the alleged evidence in error "did not affect the substantial rights" of the Petitioner. United States v. Chieppa, 241 F.2d 635, 640 (2d Cir. 1975), cert. denied, 353 U.S. 973 (1957). This alleged error is "harmless" because "in view of the fact that this record fairly shrieks the guilt of the(Petitioner), we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict." Lutwak v. United States, supra at 619-620. In light of the entire body of evidence, the statements were simply not prejudicial against the Petitioner. Feyrer v. United States, 314 F.2d 110, 112 (9th Cir. 1963), cert. denied, 381 U.S. 940 (1964).

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court held that extrajudicial statements by a co-defendant admitted in trial amounted to reversable error. There was, however, little evidence outside of the

improper statements. Bruton v. United States, supra at 125-126. The United States Supreme Court has since held that a Bruton error may be harmless. In Brown v. United States, supra at 230-232, the court held that "the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." The Bruton error was harmless. See also, Schneble v. Florida, 405 U.S. 427 (1972).

The Respondent maintains that the instant case falls within the holding and spirit of these decisions and Criminal Rule 52(A). Therefore, should this evidence be found in error, the Respondent respectfully submits that the error is harmless.

PETITIONER'S THIRD REASON FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION INTO EVIDENCE IN THE PROSECUTION'S CASE IN CHIEF THAT AFTER RECEIVING MIRANDA WARNINGS AND DURING THE COURSE OF INTERROGATION, THE PETITIONER EXERCISED HIS RIGHTS TO REMAIN SILENT AND TO CONFER WITH COUNSEL, SO PENALIZED THE PETITIONER FOR EXERCISE OF SAID RIGHTS, THAT HE WAS DENIED THE PROTECTIONS OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The following portion of direct examination is referred to by Petitioner in this proposition:

Q. Now, when you got there at 3 o'clock on Roscoe Avenue, did you arrest the Defendant?

A. Yes, sir, we did.

Q. And in whose cruiser was he put?

A. He was placed in the rear of mine and Singleton's and Lieutenant Baughard's vehicle.

Q. Was he transported to the station?

A. Yes, he was.

Q. Was he questioned at all on the way to the station?

A. No, sir.

Q. Did Lieutenant Baughard say anything to him when he got in the car?

A. Lieutenant Baughard read him the standard Miranda rights, but there were no questions asked.

Q. Now, when he got to the police station, where was he taken?

A. He was taken to the sixth floor of the Akron Police Department and placed in interview room number three.

Q. What is the sixth floor of the Akron Police Department?

A. The Detective Bureau.

Q. Now, did any officers go in to question him?

A. Yes, sir.

Q. Who all went in?

A. Captain John Traub, now retired; Lieutenant Baughard and myself.

Q. And was the Defendant there?

A. Yes, sir.

Q. And were you present?

A. Yes, sir.

Q. Okay, and was he given his rights again?

A. Yes, sir, he was.

Q. Who gave him his rights this time?

A. Captain John Traub.

Q. What did Captain Traub say; relate the conversation that happened then?

A. Captain Traub informed Mr. Perryman that he was under arrest for the aggravated murder of Lawrence Busch which occurred on November 27, 1974, which occurred in the Star Market parking lot on South Arlington Street.

At this time, Mr. Perryman stated he didn't know anything about a murder. Captain Traub at that time stated, "Well, I am going to lay it on the line." He stated that, "We have arrested Richmond; we have arrested Pitts."

MR. CALHOUN: Now, just a minute. Check this at this point. May we approach the bench, please?

(THEREUPON, Mr. Kirkwood, Ms. Boyer, Mr. Thompson and Mr. Calhoun approach the bench and

have a discussion with the Judge out of hearing of the jury.)

MR. KIRKWOOD: Overruled, Your Honor?

COURT: Yes.

(THEREUPON, the following was offered for the record by Mr. Calhoun out of hearing of the jury.)

MR. CALHOUN: Just state this line of conversation between Captain Traub and the Defendant, William Perryman, at this point I just want a continuing objection so as not to interrupt the line of questioning.

(THEREUPON, the following proceedings were held in the hearing of the jury.)

BY MR. KIRKWOOD:

Q. Detective Duvall, I would like you to start again where Captain Traub says to the Defendant, "I am going to lay it on the line." Go ahead.

A. He stated, "I am going to lay it on the line." He said, "We have arrested Pitts; we arrested Richmond; both had told their stories. Both had implicated him as the trigger man," and Captain stated that we would like to hear his story. He then stated that we have traced Mr. Perryman, a gun purchase of a .38 caliber Blue Seal revolver which was purchased the day before the homicide in Barberton, Ohio.

At this time, the Defendant appeared nervous and hesitated, and then stated that he wished to have an attorney.

Q. Did he make any statement whatsoever with regards to the gun?

A. He stated, well, before ---- right before he requested an attorney, he stated that he did purchase the weapon in Barberton, but that he had given it to Richmond awhile back, and this was where the questioning ceased.

Q. Awhile back? What day were you questioning him; what day was that?

A. March 21.

Q. After he said he would like to see an attorney, what did you do then?

A. There was no more questions asked. Myself and Lieutenant Baughard and the Captain then exited the room, and he was taken down to Summit County booking for aggravated murder. (Transcript, Pages 787-792).

Petitioner contends that the Prosecutor impermissibly raised the Defendant's post-arrest silence as prohibited by Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91 (1976).

The holding of that case is: "We hold that the use for impeachment purposes of petitioner's silence at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." Doyle, supra 49 L.Ed.2d 98.

In Doyle, petitioners Wood and Doyle both stated at the time of their arrest for sale of marijuana, that they did not know what the police were talking about and did not give a statement, either inculpatory or exculpatory. At trial, the petitioners gave an exculpatory statement that a narcotic's informant framed them by planting $1,320.00 in their car, and that they did not transfer 10 pounds of marijuana to the informant.

In this case, the Defendant gave a partially inculpatory statement to the police, after waiving his Miranda rights, concerning the weapon. Thus, one can readily distinguish this case from Doyle, supra. The rule of that case prohibits cross-examination of the Defendant on the use of

his Fifth Amendment, Miranda rights, not the non-use of them.

The Ohio Supreme Court recently dealt with a case similar to this in State v. Osborne (1977), 50 Ohio St.2d 211, 216-217, and stated:

> If a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling only part of his story is certainly not protected by Miranda or Doyle. A contrary rule would foreclose any cross-examination, for fear that it might reveal impeachment information intentionally withheld and inextricably interwoven with that which was divulged. The Supreme Court in various contexts has reminded us that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez (1963), 372 U.S. 144, 160; Aptheker v. Secretary of State (1964), 378 U.S. 500, 509 (quoting Mendoza-Martinez). This proposition of law is overruled.

This case can also be distinguished from Doyle because the post arrest silence was not used to impeach the defendant, nor was it brought up in closing. In Doyle the prosecutor repeatedly inquired of the defendant why he had not told the police the story he was testifying to at the time of arrest. Then the prosecutor made that the theme of his closing argument. In this case there was only a brief recitation of what occurred, rather than a continual line of cross-examination.

The Court in Doyle noted that the State did not contend that the error in that case was harmless. Doyle, supra 49 L.Ed.2d 99. In this case the State asserts that the

error if any was harmless. (See argument in Number II).

Finally, this issue was not raised in the State Courts. While Petitioner objected to this statement, the objection was based on the hearsay nature of the statement. See Petitioner's second proposition. Accordingly, Respondent respectfully submits that this issue has been waived.

PETITIONER'S FOURTH REASON FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER, WHEN IDENTIFICATION TESTIMONY IS SOUGHT TO BE ADMITTED AT A CAPITAL TRIAL STRICTER SCRUTINY OF SUCH TESTIMONY'S RELIABILITY IS REQUIRED TO MEET THE DEMANDS OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, AND WHETHER, IN ANY EVENT, THE DUE PROCESS CLAUSE MANDATES EXCLUSION OF THE IDENTIFICATION TESTIMONY HEREIN.

Petitioner's contention that the identification procedure in this case violated the Due Process Clause of the Fourteenth Amendment is unreasonable when his codefendant testified regarding Petitioner's involvement. To raise the issue of identity under these circumstances is ludicrous.

In addition to the Petitioner's codefendant's testimony, an eyewitness, Michael Alldredge testified at trial that he was about 85% certain that the Petitioner was the man he observed arguing with Lawrence Busch in the parking lot at the time of the murder. A review of the facts in the instant case will show that when the standard of "the totality of the circumstances," Simmons v. United States, 390 U.S. 377 (1968), is applied, the Petitioner's argument must fail. As Justice Black noted in his separate opinion in Simmons v. United States, supra at 395, the weight of the evidence of identifying witnesses is a question for the jury and is not a due process issue.

Further, the State submits that Petitioner's position that identification procedures used were not reliable and

required exclusion of the identification testimony is also without merit. United States v. Ash, 413 U.S. 300 (1973) dealt with a post-indictment photographic display. Following a thorough discussion of the Sixth Amendments right to counsel and photographic displays, the court reached the logical and reasonable conclusion that:

> We are not persuaded that the risk inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguard is required. We hold, then that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.
>
> United States v. Ash, supra at 321.

The United States Supreme Court noted that this holding was consistent with decisions of the Court of Appeals of nine federal circuits and was also consistent with the majority of decisions in state courts. United States v. Ash, supra at 301. Justice Stewart, in a concurring opinion, discussed the advantages of a photographic display over a lineup and found that:

> A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial.
>
> United States v. Ash, supra at 324.

In Simmons v. United States, 390 U.S. 377, 384

(1968), the United States Supreme Court credited the use of photographic displays for purposes of identification and further held that:

> The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in Stovall v. Denno, 388 U.S. 293, 301-302, and with decisions of other courts on the question of identification by photograph.

Ohio has chosen not to exclude photographic displays as a means of identification as an investigatory technique. Furthermore, Ohio has also allowed the admission of photo arrays into evidence at trial when the investigatory procedures were not suggestive. State v. Breedlove, 26 Ohio St.2d 178 (1971); State v. Wilkinson, 26 Ohio St.2d 185 (1971); State v. Evans, 32 Ohio St.2d 185 (1972). The Supreme Court of Ohio held in the instant case that "the inconsistencies in Alldredge's testimony do not indicate an identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irriparable misidentification". State v.

Perryman, 49 Ohio St.2d 14, 23 (1976). There was no violation of the criteria formulated by controlling Federal and State law.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Respondent's Answer to Petition for a Writ of Certiorari was mailed, first class postage paid, to: RICHARD L. AYNES, Attorney at Law, School of Law, The University of Akron, Akron, Ohio 44325, PARKE G. THOMPSON, Attorney at Law, 713 Centran Building, Akron, Ohio 44308, and WILLIAM F. CALHOUN, Attorney at Law, 141 E. Main Street, Kent, Ohio 44240.

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